90-698

No. _____

In The

Supreme Court of the United States

October Term, 1990

ALLENE FIELDS and EARLINE DANIELS,

Petitioners,

v.

HALLSVILLE INDEPENDENT SCHOOL DISTRICT, ET AL.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Fifth Circuit Court of Appeals erred in affirming summary judgment for State Respondents by finding that Petitioner school teachers were not employed by the State and therefore could not hold the State liable for its discriminatory decertification and subsequent employment termination of Petitioners?

2. Whether Petitioners by requesting consideration for other positions at the time of the hearing appealing their terminations raised a genuine issue of fact thereby precluding entry of summary judgment on the issue of whether they failed to apply for other positions for which they were qualified?

PARTIES TO PROCEEDING

Allene Fields; Earline Daniels; Hallsville Independent School District; Texas Education Agency; Texas Commissioner of Education; Texas State Board of Education; and the State of Texas.

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OPINIONS BELOW

The opinions of the District Court are unreported, and appear in the Appendix at page B-1 and page C-1. The opinion of the Court of Appeals is reported as *Fields v. Hallsville Independent School Dist.* at 906 F.2d 1017 (5th Cir. 1990) and appears in the Appendix at page A-1. The Judgment of the Court of Appeals denying petition for rehearing was entered on July 30, 1990 and appears at the appendix at page D-1.

JURISDICTION

The judgment of the Court of Appeals denying Petitioners' petition for rehearing was entered on July 30, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. section 1254(1).

STATUTES INVOLVED

The Age Discrimination in Employment Act of 1967 (ADEA), as amended, sections 2 et seq., 11, 29 U.S.C. section 621 et seq., 630; Title VII of the Civil Rights Act of 1964 (Title VII), section 701 et seq., 42 U.S.C. section 2000e et seq.; Employee Retirement Income Security Act of 1974, sections 2 et seq., 3, 29 U.S.C.A. sections 1001 et seq., 1002.

STATEMENT OF THE CASE

This case presents a challenge to the Texas Examination for Current Administrators and Teachers (TECAT) on the basis of its discriminatory impact against minority test-takers in general, and older black educators in particular. Petitioners failed to pass the TECAT. Their teaching licenses were revoked and Petitioners were terminated from their employment for failing a "competency examination" despite many years of satisfactory annual teaching evaluations.

Petitioners filed charges of age and race discrimination with the Equal Employment Opportunity Commission (the EEOC). The EEOC found employment

discrimination with respect to the disproportionate impact of the failure rate on black and older minority test-takers. Petitioners subsequently brought suit under the ADEA, Title VII and ERISA against both the school district in which they taught and against the Texas State respondents who formulated the examination and decertified those teachers who failed to pass the examination.

The District Court entered summary judgment in favor of the State agency Respondents, holding that Petitioners had failed to make a prima facie case of disproportionate impact upon black test-takers of the TECAT, and that the State agencies were not an "employer" of Petitioners within the meaning of the ADEA. The District Court entered summary judgment for Respondent Hallsville Independent School District after finding that the Petitioners had failed to apply for subsequently available non-teaching positions in the school district.

On Appeal, the United States Court of Appeals for the Fifth Circuit affirmed the summary judgment entered by the District Court, holding that Petitioners had not shown the existence of an employer-employee relationship with Respondent State agencies for ADEA and Title VII purposes. The Court of Appeals also affirmed summary judgment for Respondent school district, finding that Petitioners had failed to apply for non-teaching positions that later became available and were filled by younger, less-qualified applicants.

REASONS FOR GRANTING THE WRIT

I. Texas Educators Are In Fact Employed by the State

The decision of the Fifth Circuit Court of Appeals affirming summary judgment in this case calls for the exercise of this Court's supervision over important questions of federal law which touch the lives of many Americans, namely, our nation's educators. The TECAT examination, which has been demonstrated to disproportionately impact upon teachers whose educations have been tainted by the historical racism and discrimination of Jim Crow schools and universities, and who have been excellent school teachers by all measures other than a single standardized test, is immune from challenge in the Fifth Circuit by a logic that fails to account for the reality of Texas educators' employment relationship to the State.

The Fifth Circuit has concluded that "the State's role with respect to the TECAT is analogous to that of state bar administrators and other state licensing or certification agencies previously held not to be the employers of unsuccessful test-takers under Title VII." The Court of Appeals' conclusion ignores the unique value our society places on education, and the correspondingly fundamental role State government plays in planning, financing and administering public education. The State does not merely license teachers as the Fifth Circuit has concluded, rather it regulates almost all aspects of a teacher's professional life.

This Court has long recognized the paramount importance of education to a democracy. "Today, education is perhaps the most important function of state and local governments. Compulsory attendance laws and the

great expenditures for education both demonstrate our recognition of the importance of education to our democratic society." *Brown v. Board of Education*, 347 U.S. 483, 493, 74 S.Ct. 686, 691, 98 L.Ed. 873 (1954). If anything, the role of state government has increased since this Court's observation in 1954. In Texas, the State Constitution calls for the State to provide for a system of public education. Texas Constitution, Article 7, Section 1. The Texas legislature has drafted and enacted the Texas Education Code which mandates funding for Texas public schools as well as a comprehensive administrative scheme. V.T.C.A., Education Code Section 16.001. Out of the State funds come teacher salaries, sick leave and retirement benefits and career ladder professional advancement salary increases. V.T.C.A., Education Code sections 13.002, 16.055, 13.903, 13.904 and 13.301 et seq. The Texas Education Code also regulates the content of the teaching profession, including what courses of study an educator must teach, and requiring educators to submit to the State daily and monthly reports and records.

Respondents are not simply a governmental licensing board as the Court of Appeals concluded. The authority cited by the Fifth Circuit Court of Appeals for this conclusion is readily distinguishable in each and every case. E.g., state bar administrators do not fund the practice of law, they do not prescribe the number of cases an attorney may handle, they do not require progress or litigation reports of the attorneys, and most importantly state bar administrators do not direct in any sense the future of an attorney's practice, neither in how much money an attorney can earn, when he or she will retire, nor when an attorney will be promoted. *Woodward v. Virginia Board of*

Bar Examiners, 598 F.2d 1345 (4th Cir. 1979). The same is true of dental and veterinary examiners. *See George v. New Jersey Bd. of Veterinary Medical Examiners*, 794 F.2d 113 (3rd Cir. 1986); *Haddock v. Board of Dental Examiners*, 777 F.2d 462 (9th Cir. 1985). Both professions, the practices of dental and veterinary medicine, are fundamentally private. The State performs only a minimal regulatory function to protect the public from the danger of malpractice. The State does not fund the earnings of either professional, nor limit his or her earnings. The State does not regulate the professionals' career advancement, provide for his or her retirement, control the size of the professional practice or require reports or records of activity.

The State's role in the teaching profession is far different. An educator's role is essentially public. Under the *Spirides* test for determining the existence of an employment relationship, adopted by the Fifth Circuit Court of Appeals in *Mares v. Marsh*, 777 F.2d 1066 (5th Cir. 1985), the "economic reality" of an educator's relationship to the State is that of an employee. As noted above, the State's role in the provision of public education is pervasive. Other courts faced with the same challenge as that at bar have recognized the economic reality of school teachers' employment:

> Although the public schools in Georgia are operated by local school boards, the activities of the local boards are part of a statewide educational program which is administered by the State and by the Georgia State Board of Education. The State and, in particular, the Board of Education exercises authority over the local school boards in matters that range from curriculum and program requirements to funding,

> construction of facilities, and long-range planning by local school systems. Under these circumstances, it cannot be determined as a matter of law at this stage of the proceeding that defendants are not "employers" for purposes of Title VII. *Accord United States and North Carolina Association of Educators v. North Carolina*, No. 4476 (E.D.N.C. June 23, 1982). . . . *Cf. Williams v. City of Montgomery*, 742 F.2d 586, 588 (11th Cir. 1984), *cert. denied*, 471 U.S. 1005 (1985).

Georgia Association of Educators. et al. v. State of Georgia, et al., C.A. No. 86-2234A (N.D. Ga., May 20, 1987).

Summary judgment should not have been entered in favor of the State Respondents on this issue and was erroneously affirmed by the Fifth Circuit Court of Appeals.

II. Petitioners Applied for Positions Within The Meaning of McDonnell-Douglas

The Fifth Circuit Court of Appeals recognized that oral application for non-certified teaching positions is sufficient under the *McDonnell Douglas* test, but then held that Petitioners' application without evidence of follow-up nullified their application. The Court of Appeals improperly affirmed the lower court's resolution of a factual dispute. The record shows that two applicants who were hired for non-certified positions in 1987 had applied in 1985, and one who was hired in 1988 had also applied three years earlier in 1985. This evidence raised a disputed question of fact as to what the application procedure and practice were at Respondent Hallsville Independent School District, and should not have been decided by summary judgment. Petitioners should have

been allowed to develop the evidence of the practice of respondent in filling positions in the school district. Instead, the lower courts made the fact finder's decision, and wrongfully deprived Petitioners of their right to have a jury resolve their claim.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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APPENDIX A-1

Allene FIELDS and Earine Daniels,
Plaintiffs-Appellants,

v.

HALLSVILLE INDEPENDENT SCHOOL DISTRICT, et al.,
Defendants-Appellees.

No. 89-2664.

United States Court of Appeals,
Fifth Circuit.

July 3, 1990.

Rehearing Denied July 30, 1990.

Teachers who were terminated for failing to pass Texas' compulsory certification examination brought an employment discrimination action against various state officials and the school district. The United States District Court for the Eastern District of Texas, Sam B. Hall, Jr., J., entered summary judgment for all defendants, and teachers appealed. The Court of Appeals held that: (1) teachers were not employees of the state, and (2) under Title VII, teachers did not apply for vacancies of noncertified positions.

Affirmed.

Larry R. Daves, Daves, Hahn & Levy, San Antonio, Tex., for plaintiffs-appellants.

John F. Bufe, Potter, Guinn, Minton, Roberts & Davis, Tyler, Tex., for Hallsville Independent School Dist., et al.

Kevin O'Hanlon, Asst. Atty. Gen., Jim Mattox, Atty. Gen., Austin, Tex., for State of Tex.

Appeal from the United States District Court for the Eastern District of Texas.

Before POLITZ, KING and WILLIAMS, Circuit Judges.

PER CURIAM:

Plaintiffs Allene Fields and Earine Daniels (collectively, Teachers) appeal from the district court's grant of summary judgment to all defendants in this discrimination action. We conclude that Teachers failed to put forth evidence creating a genuine issue that the State of Texas or certain officials or agencies of the State were their employers. We also hold that Teachers failed to present evidence that they applied for subsequent vacancies at Hallsville Independent School District after being fired.

I.

After Teachers failed to pass a compulsory certification examination – the Texas Examination for Current Administrators and Teachers (TECAT) – they were terminated from their teaching positions at Hallsville Independent School District (HISD). Teachers obtained right to sue letters from the Equal Employment Opportunity Commission (EEOC). Teachers claimed that the Texas Education Agency, Texas Commissioner of Education, Texas State Board of Education and State of Texas (collectively, the State), chose a cut-off score on the TECAT that worked to discriminate against them based on age and/or race.[1] Teachers also claimed that HISD discriminated

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[1] Teachers' claims are based on Title VII, the Age Discrimination in Employment Act (ADEA) and the Employee Retirement Income Security Act (ERISA).

against them, subsequent to their termination, by failing or refusing to consider them for non-certified positions that became available the following school year.

Teachers were special education instructors for HISD. Plaintiff, Allene Fields, a 61 year-old black woman, had been employed by HISD for 14 years, while plaintiff, Earine Daniels, a 59 year-old black woman, had worked at HISD for 11 years. Both obtained contracts for the 1986-87 school year conditioned upon passage of the TECAT examination. Teachers each took the TECAT twice but failed on each attempt.

After receiving their results, Teachers requested the HISD Board of Trustees (Board) to waive the TECAT requirement so that they could retain their positions. On August 28, 1986, Teachers, along with two other persons failing the exam, appeared before the Board with their union representative. The union representative, on behalf of Teachers, requested a waiver or, in the alternative, asked that they be considered for non-certified positions (positions not requiring passage of the TECAT). The Board denied Teachers' waiver request but ordered the Superintendent to write Teachers "advising them that upon their successful passage of the TECAT examination, and if they so desire, they will be considered for future employment on an equal basis with other applicants in their field of preparation and experience." Teachers did not subsequently take or pass the TECAT. Nor did Teachers ever fill out a written application or otherwise express a desire to be considered for arising vacancies. Over one year after Teachers meeting with the Board, the first non-certified teachers aid positions became available. These positions were filled by other persons.

HISD and the State defendants each moved for summary judgment. The district court granted these motions finding, *inter alia*, that the State was not Teachers' employer and that Teachers had not applied for subsequent vacancies at HISD.

II.

Under Rule 56 of the Federal Rules of Civil Procedure, summary judgment is proper if there is "no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law. "[T]he plaintiff must present affirmative evidence in order to defeat a properly supported motion for summary judgment." *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 257, 106 S.Ct. 2505, 2514, 91 L.Ed.2d 202 (1986). This requires that a plaintiff "make a showing sufficient to establish the existence of an[y] element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex v. Catrett*, 477 U.S. 317, 322-23, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986). The standard for reviewing a summary judgment on appeal is the same as that applied by the district court. *Reid v. State Farm Mut. Auto Ins.*, 784 F.2d 577, 578 (5th Cir.1986).

III.

Teachers argue that the district court should not have granted summary judgment to the State defendants because, contrary to the district court's conclusion, Teachers were employees of the State. Teachers claim that an employment relationship between themselves and the

State defendants exists under our circuit's hybrid economic realities/common law control test.[2] The *only* evidence presented by Teachers suggesting control is the Texas State Board of Education's administration of the TECAT exam and its ability to decertify teachers who fail the exam.[3]

In *Mares v. Marsh*, we adopted the hybrid economic realities/common law control test for determining the existence of an employment relationship. 777 F.2d 1066 (5th Cir.1985). This test was first announced in *Spirides v. Reinhardt*, 613 F.2d 826 (D.C.Cir.1979). Under our test, the right to control an employee's conduct is the "most important factor." *Broussard v. L.H. Bossier, Inc.*, 789 F.2d 1158, 1160 (5th Cir.1986). As *Spirides* explains, "[i]f an employer has the right to control and direct the work of an individual, not only as to the result to be achieved, but also as to the details by which that result is achieved, an employer/employee relationship is likely to exist." 613 F.2d at 831-32. A number of additional factors beyond the control element may also be considered when assessing

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[2] Teachers do not argue that HISD and the State should be considered a single employer under either a joint employer or instrumentality theory. *See EEOC v. Wooster Brush Co. Employees Relief Ass'n*, 727 F.2d 566, 571-73 (6th Cir.1984). We therefore do not address this issue.

[3] In a footnote in Teachers' brief on appeal, they present evidence regarding state funding of facilities, payment of salaries and selection of textbooks. As this evidence was not before the district court, it is not part of the summary judgment record on appeal.

the "economic reality" of the supposed employment relationship.[4] *Id.* at 832.

The *Mares* case presents an instructive application of our circuit's test. Mary M. Mares (Mares) was a grocery bagger at the main commissary at Fort Bliss, Texas, who claimed she was an employee of the United States Army (Army) for the purposes of Title VII. Finding that the Army did not control Mares and that the economic realities of her relationship with the Army did not suggest an employer/employee tie, the district court granted summary judgment to the Army. 777 F.2d at 1067. We affirmed. With regard to control, we noted that although the Army reserved the right to veto the selection of employees, issued regulation affecting dress and conduct,

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[4] The factors listed by the *Spirides* court include:

> (1) the kind of occupation with reference to whether the work usually is done under the direction of a supervisor or is done by a specialist without supervision; (2) the skill required in the particular occupation; (3) whether the "employer" or the individual in question furnishes the equipment used and the place of work; (4) the length of time during which the individual has worked; (5) the method of payment, whether by time or by the job; (6) the manner in which the work relationship is terminated; *i.e.*, by one or both parties, with or without notice and explanation; (7) whether annual leave is afforded; (8) whether the work is an integral part of the business of the "employer"; (9) whether the worker accumulates retirement benefits; (10) whether the "employer" pays social security taxes; and (11) the intention of the parties.

613 F.2d 826, 832 (D.C.Cir.1979).

and imposed the Army's equal opportunity policies; the Army did not hire, fire, supervise, or set schedules for the bagger group. *Id.* at 1068. Thus, we concluded the "absence of control," along with the lack of economic ties between the baggers and the Army,[5] warranted the district court's conclusion that Mares had failed to put forth evidence creating a genuine issue as to the existence of an employment relationship with the Army. *Id.* at 1068-69.

Similarly, Teachers have not put forth sufficient evidence of an employment relationship with the State to create a genuine issue of material fact. The only evidence Teachers give with respect to the control aspect of the Fifth Circuit test is the State's administration of the TECAT exam. There is no evidence in the record that the State played any role in the general hiring or firing of teachers.[6] Nor is there evidence in the record that the State was involved in the daily supervision of Teachers. The State's role in the administration of the TECAT is wholly insufficient, standing alone, to create an inference of control under this circuit's test. Indeed, the State's role with respect to the TECAT is analogous to that of state bar administrators and other state licensing or certification agencies previously held not to be the employers of unsuccessful test takers under Title VII (or the ADEA). *See, e.g., Tyler v. Vickery*, 517 F.2d 1089, 1096 (5th Cir.1975),

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[5] The baggers received no wages from any source since their compensation came from tips. The Army also did not give baggers medical leave, insurance or retirement benefits.

[6] The record indicates that HISD was responsible for hiring, firing and transfers. HISD was also listed as employer on application and personnel forms.

cert. denied, 426 U.S. 940, 96 S.Ct. 2660, 49 L.Ed.2d 393 (1976); *Woodward v. Virginia Board of Bar Examiners*, 598 F.2d 1345 (4th Cir.1979); *see also George v. New Jersey Bd. of Veterinary Medical Examiners*, 794 F.2d 113, 114 (3d Cir.1986); *Haddock v. Board of Dental Examiners*, 777 F.2d 462 (9th Cir.1985); 1 A. Larson & L. Larson, *Employment Discrimination* § 5.24 (1990). Because the evidence before the district court suggested no more than a licensing relationship between the State and Teachers, we conclude that the district court properly granted summary judgment to the State.[7]

IV.

Teachers also contend that the district court erred in granting summary judgment to HISD. The district court held, *inter alia*, that Teachers' verbal expression of interest in non-certified positions at an HISD Board meeting did not create a genuine issue that Teachers *applied* for vacancies occurring over one year subsequent to the meeting. Teachers contend however that their verbal expressions of interest in non-certified positions gave rise to a genuine issue that they submitted employment applications.

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[7] The district court granted summary judgment on Teachers' ADEA and ERISA claims on the basis that the State was not Teachers' employer. *See* 29 U.S.C. §§ 630 & 1002. It granted summary judgment to the State on Teachers' Title VII claims on a separate ground. However, since the definitions of "employer" and "employee" under both the ADEA and Title VII are identical for our purposes, we conclude that the State and Teachers did not have an employment relationship under either statute. *See* 42 U.S.C. § 2000e.

Teachers had previously obtained contracts for the 1986-87 school year. Their contracts stated however that Teachers must pass the TECAT or obtain a waiver from the Texas Commissioner of Education before the beginning of the 1986-87 school year. Teachers failed the TECAT twice in 1986. On June 30, 1986, Teachers, along with two other employees failing the TECAT, requested waivers. The Board considered Teachers' waiver requests on August 28, 1986. Teachers, along with their union representative, attended the August 28 meeting. According to Teachers, the union representative, Vance Rogers, requested that Teachers be given a waiver or, in the alternative, that Teachers be considered for non-certified positions for which they were qualified. Teachers' waiver requests were denied. The Board then instructed Superintendent W.C. Wooldridge (Wooldridge) to proceed with the termination of Teachers. The Board also instructed Wooldridge to inform Teachers, and the two others failing the exam, "that upon their successful passage of the TECAT examination, and if they desire, they will be considered for future employment in the HISD on an equal basis with other applicants when vacancies occur in their field of preparation and experience."[8] Wooldridge sent letters to Teachers informing them of the Board's decision. At no time subsequent to the August 28 meeting did Teachers submit any written applications or otherwise express any desire to be considered for any openings arising.

No non-certified positions became available during the 1986 calendar year. The first teachers aide positions to

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[8] The Board issued an order to this effect.

come available occurred on September 10, 1987 (over one year after Teachers' meeting with the Board). Each of the persons hired for non-certified positions for the 1987 and 1988 school years submitted written applications.

In *McDonnell Douglas Corp. v. Green*, the Court set out four elements that a plaintiff must initially prove in a Title VII case. 411 U.S. 792, 802, 93 S.Ct. 1817, 1824, 36 L.Ed.2d 668 (1973); *see also Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253, 101 S.Ct. 1089, 1093, 67 L.Ed.2d 207 (1981). One of these requirements is that a plaintiff apply for a position for which she is qualified. *Id.* An oral application may be sufficient. *Howard v. Summit County Welfare Dept.*, 525 F.Supp. 1084, 1089 (N.D.Ohio 1981) (oral application sufficient despite general policy requiring written applications where one oral application had been previously accepted); *but see Wright v. Stone Container Corp.*, 524 F.2d 1058, 1063 (8th Cir.1975) (oral application held insufficient). While a vacancy need not exist on the precise day of application, an application will only be "treated as viable for a reasonable period of time." *McLean v. Phillips-Ramsey, Inc.*, 624 F.2d 70, 72 (9th Cir.1980) (written application one month before vacancy sufficient where applicant had mailed follow-up letter); *see also Phillips v. Joint Legislative Committee on Performance and Expenditure Review*, 637 F.2d 1014, 1030 (5th Cir.1981), *cert. denied*, 456 U.S. 960, 102 S.Ct. 2035, 72 L.Ed.2d 483 (1982) (although exact date vacancy occurred was unclear, district court erred in requiring that vacancy "exist on the precise day of application"); *Harrell v. Northern Elec. Co.*, 672 F.2d 444, 449 (5th Cir.), *cert. denied*, 459 U.S. 1037, 103 S.Ct. 449, 74 L.Ed.2d 603 (1982) (plaintiff submitted written application in August 1974, was told

she would be considered for a clerical assignment when one became available, interviewed for a position in October 1974 but was turned down – held, plaintiff "applied for" October opening). The longer the period of time between an application and subsequent vacancy, the greater the need to "follow-up" an application. *See McLean*, 624 F.2d at 72. The duty to follow-up should be greater where an applicant has only made an oral inquiry. *See Farmer v. Washington Fed. Sav. & Loan Ass'n*, 488 F.Supp. 55, 57-58 (N.D.Miss.1979) (oral application plus three follow-up calls held insufficient under circumstances).

We believe that the district court correctly concluded that Teachers' oral expression of interest, without any follow-up inquiry, was insufficient as a matter of law. Teachers' oral inquiry to the Board contravened HISD's typical written application method. Moreover, the Board's resolution acknowledging Teachers' interest in future positions was conditional. The order of the Board stated that Teachers would be considered for future employment "upon passage of the TECAT examination and if they desire. . . . " Even if, as Teachers contend, they orally sought *non-certified* positions, the Board's resolution required them to follow up on their request by expressing their "desire" for arising vacancies. Yet, in the months and years that followed, Teachers never indicated their desire to be considered for future vacancies in subsequent school years. In the two school years following Teachers' meeting with the Board, Teachers did not submit written applications, make follow-up phone calls or otherwise express their interest. Under these uncontested

facts, we cannot say that Teachers applied for vacancies within the meaning of *McDonnell Douglas*.

V.

Having reviewed Teachers' claims of error and found none compelling, we affirm the district court.

AFFIRMED.

APPENDIX B-1

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

EOD JUN 6 1989

ALLENE FIELDS and EARINE DANIELS	)	
VS.	)	NO. M-88-97-CA
	)	FILED
TEXAS EDUCATION AGENCY, ET AL.	)	JUN 6 1989

OPINION AND ORDER

Came on for consideration Plaintiffs' Motion for New Trial and/or Motion for Reconsideration and Defendants' Response thereto. Plaintiffs complain of the Summary Judgment entered for Defendants on May 3, 1989, which held that Plaintiffs had failed to make a prima facie case of disproportionate impact upon blacks of the legislatively mandated Texas Examination for Current Administrators and Educators (TECAT).

Plaintiffs state on page 2 of their Motion that "the court erred in concluding that because the state defendants were not Plaintiffs' nominal employer that Plaintiffs failed to state a claim against these Defendants under Title VII. . . . " That statement is incorrect; Summary Judgment was entered for Defendants because Plaintiffs failed to make a prima facie case in their Title VII charge. The Court dismissed Plaintiffs' allegations based upon the Age Discrimination in Employment Act and the Employee Retirement Income Security Act since the

Defendants were not Plaintiffs' employers. Plaintiffs have not contested that dismissal.

Plaintiffs evidently do not recognize that age discrimination is outside the scope of Title VII of the Civil Rights Act of 1964, 42 U.S.C. Sections 2000e *et seq.* Title VII encompasses race, color, religion, sex, and national origin. Therefore, only Plaintiffs' claim of a disproportionate impact of the TECAT upon black teachers is under consideration.

This Court noted in its earlier Opinion that, as a general rule, facially neutral testing procedures are not deemed, under Equal Employment Opportunities Commission Guidelines, to be evidence of adverse, discriminatory impact upon a protected group unless the selection rate for that group is less than four-fifths of the selection rate for the group with the highest selection rate. 29 C.F.R. 1607.4(D)(1987). Plaintiffs accept the threshold analysis of this standard, but propose to apply the standard to the failure rates on the test rather than the selection rates as described in the EEOC Guidelines. Such a proposal is counter to the stated guidelines, statistical reasoning, and is not the law. Plaintiffs state on page 2 of their Motion that the "black fail rate is less than four-fifths of the white fail rate for every age grouping." If the black fail rate is, for example, 1.57 and the white fail rate is .14, the black fail rate is greater than the white fail rate, not less than four-fifths of it. The Court assumes that Plaintiffs' Motion is made in good faith, and that they are confused in their statistical understanding.

Among the statistical comparisons brought before this Court, none show the TECAT selection rate for blacks

to be less than four-fifths that of whites. The four-fifths comparison, however, is not dispositive if other factors indicating discriminatory intent can be shown. Plaintiffs bring forward no other factors in their Motion for New Trial for consideration. Plaintiffs do not question the job-relatedness of the TECAT. No issues are raised as to the relevance that basic reading and writing skills bear to public school teaching. Plaintiffs complain that the State Board of Education knew or should have known when it set the cut-off score that black teachers would be adversely impacted.

Accordingly to the materials in the record before the Court, the following recommendations were compiled as to a cut-off score for the TECAT.

Proposing Group:	*Reading Section:*	*Writing Section:*
TECAT Advisory Committee	36 (standard deviation 13)	19
Statewide Review	38 (standard deviation 7.5)	19 (standard deviation 4.1)
Commissioner of Ed. TEA Staff	40	21
State Board of Educ.	41	23

The cut-off scores selected by the State Board of Education did not deviate far from the range of recommendations, particularly given the broad standard deviations associated with the recommended scores. Further, the deposition of Nolan Earl Woods, Jr., provided by Plaintiffs, includes a clear description of the reasoning behind the State Board's selection of scores, including experience with field test data, the projected use of preparatory materials and courses to be offered examinees prior to the

test. Plaintiffs offer no facts to support their vague allegation that the State Board should have set lower cut-off scores.

Plaintiffs point to Tables 15 and 17 of the T.E.A. Deposition Exhibit 4, which are estimated performance statistics, in an attempt to show that the State Board knew or should have known that the TECAT cut-off scores would adversely impact black teachers. These tables show that, at any score, the percentage of blacks passing the TECAT would be smaller than the overall pass rate. Thus, no matter what cut-off score had been selected by the State Board, the pass rate for blacks would have been lower than the total pass rate.[1]

The Court quotes at length from *Griggs v. Duke Power Co.*, 401 U.S. 424, 430-31 (1971), because the analysis is directly on point.

> "Because they are Negroes, petitioners have long received inferior education in segregated schools. . . . Congress did not intend by Title VII, however, to guarantee a job to every person regardless of qualifications. In short, the Act does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group. Discriminatory preference for

---

[1] The Court has in the records before it the numerical scores for one of the Plaintiffs, which show that had even the lowest recommended cut-off score been applied, Plaintiff would not have passed either part of the TECAT on either occasion that she took it. The Court did not delve into the issue of whether that Plaintiff had a live case or controversy or whether her action should have been dismissed as moot, since Plaintiffs failed to make out a prima facie case.

> any group, minority or majority, is precisely and only what Congress has prescribed. . . . If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited."

The fact that a facially neutral, job-related test has some disparate impact does not per se constitute a violation of Title VII. "Rather, the employer has the discretion to choose among equally qualified candidates, provided the decision is not based upon unlawful criteria." *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 259 (1980).

It is unfortunate the blacks have a pass rate on any exam that is lower, to any degree, than do other groups. The State Board of Education is following a legislative mandate to improve the quality of teaching in public schools so that children in Texas do not receive an inferior education and so that all children in Texas, regardless of race or ethnicity, will have a sound foundation upon which to take the exams necessary to their education and professional lives.[2] The Court is unable to conclude that a disparate impact upon blacks from the TECAT exists that is significant enough to suggest the equivalent of intentional discrimination. It is, therefore,

ORDERED, ADJUDGED, and DECREED the Summary Judgment is AFFIRMED and the Plaintiffs' Motion

---

[2] The Court would note that the Texas Supreme Court has held that competency testing as exemplified by the TECAT bears a rational relation to the legitimate state objective of maintaining competent teachers in the public schools. *State v. Project Principle, Inc.*, 724 S.W.2d 387 (Tex. 1987).

for New Trial and/or Reconsideration is in all things DENIED.

SIGNED this the 5 day of June, 1989.

/s/ Sam B Hall Jr
SAM B. HALL, JR.
United States District Judge

Mld JUN 6 1989 to:
Daves
McSwane
O'Hanlon

APPENDIX C-1

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

EOD JUN 14 1989

ALLENE FIELDS and EARINE DANIELS	)	
VS.	)	CIVIL ACTION NO. M-88-97-CA
HALLSVILLE INDEPENDENT SCHOOL DISTRICT	)	FILED 89 JUN 14

OPINION AND ORDER

Came on for consideration Plaintiffs' Motion for New Trial and/or Motion for Reconsideration, and Defendant's Response thereto. Plaintiffs complain of Summary Judgment entered for Defendant on May 11, 1989 that was based upon Plaintiffs' failure to establish a prima facie case of employment discrimination.

Plaintiffs understand that the elements necessary to make out a prima facie case are (1) that plaintiff belongs to a racial minority or protected group, (2) that plaintiff applied and was qualified for a job for which the employer was seeking applicants, (3) that despite her qualifications plaintiff was rejected, and (4) after such rejection, the position remained open and the employer continued to seek applications from persons of plaintiff's qualifications. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). Plaintiff adduced no facts in opposition to Defendant's earlier Motion for Summary Judgment. Accompanying Plaintiffs' present Motion are employment applications from several individuals, two of whom

were hired for teacher aide positions in 1987, two in 1988, and two for secretarial positions in 1988.

There are, however, no employment applications and Teachers Aide Test Scores for Plaintiffs. While Plaintiffs state in affidavits that their representative, Mr. Vance Rogers, orally told the Hallsville School Board that Plaintiffs would accept other jobs, no applications apparently were filed. An oral statement of willingness to accept employment made in August, 1986 cannot be considered to satisfy the element that plaintiff show she applied and was qualified for a job for which the employer was seeking applicants.

Plaintiffs do not contradict Defendant's assertion that no jobs were available in August and September of 1986, i.e., at the time of plaintiffs' oral offer to work. Plaintiffs claim that employment decisions made in 1987 and 1988 violated their rights. Plaintiffs have not cited, and the Court has not found, any cases that would support such a broad reading of the words "applied for" as to encompass oral offers to work. To hold otherwise would be to put an employer to whom an individual orally expressed a wish for employment in the position of justifying why that individual was not hired for any position that came open at any time thereafter. The fact that Plaintiffs had a representative meet with the school board indicates that they had advice and information. The Court can only assume that Plaintiffs knew or should have known to complete an application form for future employment with Defendant. It is, therefore,

ORDERED, ADJUDGED, and DECREED that Summary Judgment for Defendant is AFFIRMED and that

Plaintiffs' Motion for New Trial and/or Motion for Reconsideration is in all things DENIED.

SIGNED this the 13 day of June, 1989.

/s/ Sam B Hall Jr
SAM B. HALL, JR.
United States District Judge

Mld JUN 14 1989 to:
Daves
McSwane
O'Hanlon

APPENDIX D-1

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 89-2664

ALLENE FIELDS and
EARLINE DANIELS,

Plaintiffs-Appellants,

versus

HALLSVILLE INDEPENDENT
SCHOOL DISTRICT, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court for the
Eastern District of Texas

On PETITION FOR REHEARING
(July 30, 1990)

Before POLITZ, KING and WILLIAMS, Circuit Judges.
PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied

ENTERED FOR THE COURT:

CLERK'S NOTE:
SEE FRAP AND LOCAL RULES 41 FOR STAY OF THE MANDATE.

/s/ Illegible
United States Circuit Judge

(2)

No. 90-698

In The

Supreme Court of the United States

October Term, 1990

ALLENE FIELDS and EARINE DANIELS,

Petitioners,

v.

HALLSVILLE INDEPENDENT SCHOOL DISTRICT, ET AL.,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENT HALLSVILLE INDEPENDENT SCHOOL DISTRICT'S BRIEF IN OPPOSITION

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November 28, 1990

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QUESTION PRESENTED

In an employment discrimination action under Title VII of the Civil Rights Act of 1964, as amended, and the Age Discrimination in Employment Act, both Petitioner school teachers complain that their employer, HALLSVILLE INDEPENDENT SCHOOL DISTRICT ("HISD"), discriminated against them by not offering them non-teaching positions in September, 1987 and in 1988 after the school district terminated both Petitioners from their teaching positions in August, 1986. Whether the Fifth Circuit Court of Appeals erred in upholding the decision of the District Court on grounds that Petitioners failed to apply for subsequent vacancies where Petitioners did not submit written employment applications, and where no non-teaching vacancies existed until September, 1987, over one year after Petitioners made their only verbal request to the HISD school board for transfer to non-teaching positions?

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42 U.S.C. §2000(e) *et seq.* (Title VII) 1

TO THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Respondent, HALLSVILLE INDEPENDENT SCHOOL DISTRICT ("HISD"), respectfully files this its Brief in Opposition to the Petition for Writ of Certiorari filed by Petitioners Allene Fields and Earine Daniels.

INTRODUCTION

This is an employment discrimination action filed by two school teachers against HISD and various State Defendants pursuant to Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000(e), *et seq.* ("Title VII"), and the Age Discrimination in Employment Act, 29 U.S.C. § 621, *et seq.* ("ADEA"). Petitioners were previously employed by HISD as special education teachers. After both Petitioners failed to pass the Texas Examination for Current Administrators and Teachers ("TECAT"), they were terminated by HISD during August, 1986. The teachers obtained right to sue letters from the Equal Opportunity Commission ("EEOC"). In their lawsuit, the teachers claimed that the Texas Education Agency, Texas Commissioner of Education, Texas State Board of Education, and the State of Texas (collectively the "State") chose a cut off score on the TECAT that worked to discriminate against them based on age and/or race. The teachers also claimed that HISD discriminated against them, subsequent to their termination, by failing or refusing to consider them for non-certified positions that became available the following school year.

HISD and the State Defendants each moved for summary judgment in the District Court. The District Court granted these motions finding, among other things, that the State was not the teachers' employer, and that the teachers had not applied for subsequent vacancies at HISD. Thereafter, the U.S. Court of Appeals for the Fifth Circuit affirmed the District Court's judgment in favor of HISD and the State Defendants.

STATEMENT OF THE CASE

Petitioner, Allene Fields, a 61 year old Black woman, had been employed by HISD for 14 years, while Petitioner, Earine Daniels, a 59 year old Black woman had worked for HISD for 11 years. Both obtained contracts for the 1986-87 school year conditioned upon passage of the TECAT examination. Teachers each took the TECAT twice, but failed on each attempt. As a result, Petitioners lost their licenses to teach in Texas.

After receiving their test results, Petitioners requested the HISD Board of Trustees ("Board") to waive the TECAT requirements so they could retain their teaching positions. On August 28, 1986, Petitioners appeared before the Board with their union representative. The union representative, on behalf of Petitioners, requested a waiver, or in the alternative, asked that Petitioners be considered for non-certified positions (positions not requiring passage of the TECAT), especially Teacher Aide positions. The Board denied the teachers' waiver request because it was not permitted by state law. However, the Board ordered the superintendent to write the teachers

"advising them that upon their successful passage of the TECAT examination, and if they so desire, they will be considered for future employment on an equal basis with other applicants in their field of preparation and experience." Teachers did not subsequently take or pass the TECAT.

At no time after the August 28, 1986 Board meeting did either Petitioner ever complete a written employment application with HISD for any non-teaching position, including Teacher Aide positions. The only "application" ever submitted by either Petitioner for non-teaching positions was in the form of the oral statements made by the union representative to the Board at its August 28, 1986 meeting. In a letter dated August 29, 1986 the Board superintendent informed both Petitioners of the decision of the Board not to seek a waiver on their behalf. In addition, the superintendent reported the resolution adopted by the Board "that upon [either Petitioners'] successful passage of the TECAT exam, and if they desire, they will be considered for future employment in the HISD on an equal basis with other applicants when vacancies occur in their field of preparation and experience."

During August and September, 1986 there were no vacancies for any non-certified positions for which either Petitioner would have been qualified. In this regard, no Teacher Aide positions within HISD were filled during calendar year 1986.

After Petitioners were terminated on August 29, 1986, the first Teacher Aide vacancies in HISD were filled on September 10, 1987, over one year after Petitioners'

terminations. In this regard, HISD hired two white females as Teacher Aides on September 10, 1987. In addition, a school office Aide position was filled on June 17, 1988 by a white female; two classroom Teacher Aide positions were filled on August 15, 1988 and September 6, 1988 by white females; and a Receptionist/Secretary position was filled on September 27, 1988 by a white female. With the exception of the vacancies listed above, no other vacancies occurred during 1986, 1987, or 1988 for which either Petitioner was qualified. Each candidate hired for the vacancies occurring in 1987 and 1988 listed above submitted a formal written HISD job application. Contrary to the statements at page 3 of the Petition, there is no evidence in the record that the individuals hired for these openings were "less-qualified" than Petitioners.

With the exception of the verbal statements made by their union representative at August 28, 1986 Board meeting, neither Petitioner ever made any further contact with the Board or the school district to express any interest whatsoever in any subsequent positions or openings at HISD. Besides not completing a written employment application, Petitioners never once wrote a letter of interest, never telephoned any HISD personnel, and never had any conversation with any HISD official after the August 28, 1986 Board meeting, to express interest in any HISD position.

REASONS FOR DENYING THE WRIT

Petitioners' allegations against HISD fall within the disparate treatment theory under Title VII and the ADEA. The standards generally applicable to claims of disparate treatment under Title VII and the ADEA were set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 688 (1973). *See also, Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 101 S.Ct. 1089, 32 L.Ed.2d 207 (1981). One of the four elements that a Plaintiff must initially prove in a Title VII case is that the Plaintiff applied for a position for which she was qualified. Under some circumstances an oral application may be sufficient. *See Howard v. Summit County Welfare Dept.*, 525 F.Supp. 1084, 1089 (N.D. Ohio 1981) (oral application sufficient despite general policy requiring written application where one oral application had been previously accepted); *but see Wright v. Stone Container Corp.*, 524 F.2d 1058, 1063 (8th Cir. 1975) (oral application held insufficient).

In applying the *McDonnell Douglas* test, subsequent cases have established that a vacancy need not exist on the precise day of application; and that any vacancies within a reasonable time of application must be considered as well. *McLean v. Phillips-Ramsey, Inc.*, 624 F.2d 70, 72 (9th Cir. 1980) (written application one month before vacancy sufficient where applicant had mailed follow-up letter); *see also, Phillips v. Joint Legislative Committee on Performance and Expenditure Review*, 637 F.2d 1014, 1030 (5th Cir.), *cert. denied* 456 U.S. 960, 102 S.Ct. 2035, 72 L.Ed.2d 243 (1982) (although exact date vacancy occurred was unclear, District Court erred in requiring that vacancy "exist on the precise date of application"); *Harrell*

v. Northern Elect. Co., 672 F.2d 444, 449 (5th Cir.), *cert. denied* 459 U.S. 1037, 103 S.Ct. 449, 74 L.Ed.2d 603 (1982) (plaintiff who submitted written application in August 1974 was told that she would be considered for a clerical assignment when one became available, interviewed for a position in October 1974, but was turned down – held, plaintiff "applied for" October opening). Courts have also held that the longer the period of time between an application and subsequent vacancy, the greater the need to "follow-up" an application. *See McLean*, 624 F.2d 72. The duty to follow-up should be greater where in applicant has only made an oral inquiry. *See Farmer v. Washington Fed. Sav. & Loan Ass'n*, 488 F.Supp. 55, 57-58 (N.D. Miss. 1979) (oral application plus three follow-up calls held insufficient under circumstances).

In the case at bar, the undisputed facts establish that no vacancies of any kind existed for which Petitioners were qualified for over 12 months after their union representative verbally informed the School Board of the teachers' interest in non-certified, non-teaching positions. Under these circumstances, the 5th Circuit and the U.S. District Court both correctly concluded that the teachers' oral expression of interest, without any follow-up inquiry whatsoever, was insufficient as a matter of law.

No vacancy existed at the time Petitioners verbally expressed their interest in non-teaching positions at the Board meeting. Moreover, no vacancies arose within a reasonable time after the August 28, 1986 Board meeting. Although under certain circumstances a verbal employment application may be sufficient to satisfy the application requirement of *McDonnell Douglas;* HISD was not required to continually consider Petitioners for vacancies

occurring one and two years after their oral "application" at a school board meeting. Both the 5th Circuit and the U.S. District Court below correctly reached this conclusion where neither Petitioner ever contacted HISD again after the Board meeting to follow-up. No written applications were ever submitted, contrary to the established HISD practice of requiring written applications. No letters were sent expressing interest, and Petitioners made no other contact with HISD after the August 28, 1986 Board meeting to confirm their interest in any non-teaching position. Under these circumstances, the 5th Circuit correctly concluded that Petitioners did not apply for vacancies within the meaning of *McDonnell Douglas*.

In addition, the 5th Circuit correctly pointed out that the School Board's resolution acknowledging Petitioners' interest in future positions was conditional. The order of the Board stated that the teachers would be considered for future employment "upon passage of the TECAT examination and if they desire. . . . " In this way the Board's resolution required Petitioners to follow-up on their request by expressing their "desire" for future vacancies. However, subsequent to the Board meeting, Petitioners never indicated their desire to be considered for future vacancies in any way.

The Petition should be denied. There is no conflict of decisions among the circuits on the controlling issue of law presented in the Petition. Furthermore, the question presented as to HISD's liability is not of sufficient national importance to justify this Court's review. This case turns upon its own unique facts, and the application of settled law. Moreover, for the reasons set forth above, the decision of the 5th Circuit affirming the U.S. District

Court for the Eastern District of Texas is correct and should be upheld.

CONCLUSION

For the reasons set forth above, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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90-698

No. _____

* * * * * * * * *

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1990

* * * * * * * * *

ALLENE FIELDS and EARLINE DANIELS,
Petitioners,

v.

HALLSVILLE INDEPENDENT SCHOOL DISTRICT, ET AL.,
Respondents.

* * * * * * * * *

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

* * * * * * * * *

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QUESTIONS PRESENTED

I. Whether Petitioner school teachers are employed by independent school districts and not by the State of Texas, and therefore have no cause of action against the State under Title VII or the Age Discrimination in Employment Act.

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No. _____

* * * * * * * * *

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1990

* * * * * * * * *

ALLENE FIELDS and EARLINE DANIELS,
Petitioners,

v.

HALLSVILLE INDEPENDENT SCHOOL DISTRICT, ET AL.,
Respondents.

* * * * * * * * *

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

* * * * * * * * *

STATEMENT OF THE CASE

The facts underlying this controversy are not in dispute. State Repondents agree with the Statement of the Case as contained in the Petition for Writ of Certiorari, and would only respectfully remind the Court that Respondents Texas Education Agency, Texas Commissioner of Education, Texas State Board of Education, and the State of Texas will be referred to collectively throughout this Brief as "State Respondents."

REASONS FOR DENYING THE WRIT

1. State Respondents have not been Petitioners' employers for purposes of either Title VII or ADEA.

By their own unequivocal language, both Title VII and the ADEA apply only to claims of discriminatory practices by an employer. 42 U.S.C. § 2000e2(a); 29 U.S.C. § 623(a). It thus follows that in order for Petitioners to be able to state any cause of action against State Respondents, the Petitioners must have been employees or potential employees of State Respondents.

The Fifth Circuit has adopted the hybrid economic realities/common law control test, first set forth in *Spirides v. Reinhardt*, 613 F.2d 826 (D.C. Cir. 1979), to determine whether an employment relationship exists. *Diggs v. Harris Hospital- Methodist, Inc.*, 847 F.2d 270, 272 (5th Cir. 1988); *Mares v. Marsh*, 777 F.2d 1066 (5th Cir. 1985). It is true, as Petitioners assert, that the right to control an employee's conduct is the most important factor in determining employee status. *Broussard v. L.H. Bossier, Inc.*, 789 F.2d 1158, 1160 (5th Cir. 1986). However, that one factor is not determinative. Id. The *Spirides/Broussard* test

> considers the economic realities of the work relationship, and the extent to which the one for whom the work is being done has the right to control the details and means by which the work is to be performed, with emphasis on this latter control factor.

Diggs, 847 F.2d at 272. The test also involves the application of additional factors, which need not be discussed.

2. Under Texas law, a teaching certificate is a license.

The Fifth Circuit ruled that "the State's role with respect to the TECAT is analogous to that of state bar administrators and other state licensing or certification agencies previously held not to be the employers of unsuccessful test takers under Title VII (or the ADEA). *See, e.g., Tyler v. Vickery*, 517 F.2d 1089, 1096 (5th Cir. 1975), cert. denied, 426 U.S. 940 [ ]; *Woodward v. Virginia Board of Bar Examiners*, 598 F.2d 1345 (4th Cir. 1979); *see also George v. New Jersey Bd. of Veterinary Medical Examiners*, 794 F.2d 113, 114 (3d Cir. 1986); *Haddock v. Board of Dental Examiners*, 777 F.2d 462 (9th Cir. 1985)[.] *Fields v. Hallsville Ind. School Dist.*, 906 F.2d 1017, 1020 (5th Cir. 1990), reprinted at Petition for Writ, at A7-8.

Petitioners attempt to distinguish these precedents because the licencees here work for a public employer, the independent school district. Under the logic of Petitioners' argument, every licensed employee of a political subdivision of a state is potentially an "employee" of that state. There is no question that the State of Texas exercises great control over its public school system. The Constitution of the State of Texas has created an instrumentality, the "independent school district," which is charged with daily operation of Texas' schools in conformity with the law. Among the exclusive powers of this political subdivision is the authority to hire and fire its own employees. Petitioners point out that Texas' independent school districts receive funds from the State for teacher salaries. While this is true, the school districts also receive federal funds. Does this mean that Texas' teachers are also federal "employees"?

Petitioners argue that "[o]ther courts with the same challenge as that at bar have recognised the economic reality of school teachers' employment," and in support cite only an unreported district court case, *Georgia Ass'n of Educators v. Georgia*, No. 86-2234A (N.D. Ga., May 20, 1987). This case does not provide any precedent whatsoever. First, the district court merely declined to grant summary judgment on the issue. Second, there is no indication that the State of Georgia had defined for the

court what its view of Georgia law was. The Supreme Court of Texas, on the other hand, has directly spoken to this issue. In *Texas v. Project Principle, Inc.*, 724 S.W.2d 387 (Tex. 1987), the Texas Supreme Court held that a teaching certificate "is a license, and like all licenses, is subject to such future restrictions as the state may reasonably impose." *Id.*, 724 S.W.2d at 390. Such restrictions, designed to regulate the teaching profession and the public education system, are a valid exercise of the State's police power. *Texas State Teachers Assoc. v. Texas*, 711 S.W.2d 421, 425 (Tex. App. -- Austin 1986, writ ref'd n.r.e.).

The State of Texas does not become an "employer" merely by the exercise of such police powers. The *Spirides/Broussard* "economic realities" test looks to the kinds of control traditionally exercised by employers over their employees. Petitioners attempt to confuse this issue with a wholly different sort of control, that traditionally exercised by state governments over their political subdivisions. Such controls can not transform the State into an "employer" of its school district's employees.

CONCLUSION

Because no employment relationship exists between the State Respondents and Petitioners, Petitioners could not assert a cause of action against State Respondents under either Title VII or the ADEA, both of which may only be asserted against "employers." The District Court's grant of summary judgment against Petitioners was therefore correct. For these reasons, Petitioners' request for a writ of certiorari should be denied, and the judgment and opinion of the Court of Appeals for the Fifth Circuit should be allowed to stand.

Respectfully submitted,

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ATTORNEYS FOR
STATE RESPONDENTS

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument has been sent via U.S. Mail, certified, return receipt requested, on this the 30th day of November, 1990, to:

Mr. Larry R. Daves
Larry R. Daves & Associates
2311 N. Flores
San Antonio, Texas 78212

JAMES C. TODD
Assistant Attorney General